

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01297 COA

JENNIFER L. HENDERSON, TAMMY L. KIMBLE, WILLIAM P. MORRISON, JR.,
JACQUELYN RICHMOND, SUSAN L. WILKINS, CAROL J. GIBSON AND NICKIE
STEWART

APPELLANTS

v.

CITY OF CORINTH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: ALCORN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

PAUL R. HINTON

ATTORNEY FOR APPELLEE:

THOMAS L. SWEAT, JR.

NATURE OF THE CASE: TIMELY FILING OF NOTICE OF APPEAL

TRIAL COURT DISPOSITION: CIRCUIT COURT DISMISSES APPEALS, ASSERTING FAILURE TO PROVIDE TIMELY NOTICE OF APPEAL UNDER R. 7.03 OF THE UCRCCP.

MANDATE ISSUED: 8/19/97

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

After a full hearing in the Corinth Municipal Court, Jennifer L. Henderson and all other appellants were convicted of certain misdemeanors. In an attempt to appeal these convictions, the appellants filed notices of appeals in the Corinth Municipal Court, not the Circuit Court of Alcorn County. After forty days had passed subsequent to these convictions, the City of Corinth moved to dismiss the appeals, asserting that the appellants had not perfected their appeals under the procedures of Rule 7.03 of the Uniform Criminal Rules of Circuit Court Practice.⁽¹⁾ The Alcorn County Circuit Court dismissed the appeals for failure to provide timely notices of appeal under Rule 7.03. Aggrieved of this ruling, the Appellants assert on appeal the following issues:

I. IS IT NECESSARY TO FILE A NOTICE OF APPEAL, AS PROVIDED IN RULE 7.03 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE, WITH THE CIRCUIT CLERK IN ORDER TO APPEAL A CRIMINAL CONVICTION BEFORE A MUNICIPAL COURT TO THE CIRCUIT COURT?

II. IS THE WORD "MAY" USED IN RULE 7.03 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE PERMISSIVE OR MANDATORY?

III. HAS THE STATUTORY PROCEDURE FOR APPEALING A CRIMINAL CONVICTION IN A MUNICIPAL COURT, TO A CIRCUIT COURT, BEEN REPEALED BY THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE?

IV. WILL THE FAILURE OF THE MUNICIPAL COURT JUDGE AND THE MUNICIPAL COURT CLERK (OR OTHER MUNICIPAL COURT EMPLOYEES ACTING UNDER THE DIRECTION OF THE CLERK OR THE JUDGE) TO ABIDE BY THE REQUIREMENTS PLACED UPON THEM BY RULE 7.03 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE OR THE RELATED STATUTES, SECTION 91-35-1, ET

SEQ., CURE A POSSIBLE DEFECT IN THE PERFECTION OF AN APPEAL FROM THE MUNICIPAL COURT TO A CIRCUIT COURT?

V. WILL THE MUNICIPAL COURT JUDGE, THE MUNICIPAL COURT CLERK AND THE OTHER AGENTS AND EMPLOYEES OF SAID JUDGE AND CLERK, BE HELD TO THE SAME STANDARDS WITH REGARD TO COMPLIANCE WITH THE RULES OF COURT, AS THE ATTORNEYS AND LITIGANTS?

VI. IF THE APPELLANTS' ATTEMPTS TO PERFECT AN APPEAL FROM THE MUNICIPAL COURT TO THE CIRCUIT COURT WERE DEFECTIVE, SHOULD SAID DEFECTIVE APPEALS HAVE BEEN TREATED AS PETITIONS FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT?

As the first issue is dispositive, only it and the other issues as necessary, will be discussed.

FACTS

Jennifer L. Henderson, and all other appellants, were charged with at least one violation of Mississippi Code Annotated Section 97-29-31. All were convicted in the Municipal Court of the City of Corinth, Mississippi by James Porter Dean.

Henderson and the other appellants all filed with the city court clerk for the City of Corinth, notices of appeal and affidavits of indigence in lieu of bond. All the appellants served copies of their notices of appeal with the city prosecuting attorney at the same time they filed the notices with the city clerk. All notices of appeal were filed with the city court clerk more than ten days before the forty-day deadline within which appeals are to be perfected under the Uniform Criminal Rules of Circuit Court Practice (UCRCCP) Rule 7.03.

The city court clerk of Corinth did not file the records with the circuit court until after the forty-day period for an appeal had run. The city prosecuting attorney filed a motion to dismiss in all cases for failure of the appellants to perfect their appeals. Each appellant filed a motion to suspend the rules or for alternative relief asking that they be allowed to proceed with their appeals before the circuit court.

The Circuit Court of the First Judicial District of Alcorn County, Mississippi, Thomas J. Gardner, III, presiding, dismissed all appeals for failure to timely file notices of appeals as required by Rule 7.03 of the UCRCCP.

ANALYSIS

I.

IS IT NECESSARY TO FILE A NOTICE OF APPEAL, AS PROVIDED IN RULE 7.03 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE, WITH THE CIRCUIT CLERK IN ORDER TO APPEAL A CRIMINAL CONVICTION BEFORE A MUNICIPAL COURT TO THE CIRCUIT COURT?

The appellants argue that the procedure for appeal set forth in Rule 7.03 is one of two optional methods of appeal, the other being by statutory procedure under Mississippi Code Annotated Sections 99-35-1, -7, -9, which only requires the posting of an appeal bond and not a notice of appeal. Section 99-35-1 provides in pertinent part:

In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice court, or by a municipal court, for the violation of an ordinance thereof, an appeal may be taken within forty (40) days from the date of such judgment of conviction to the county court of the county, in counties in which a county court is in existence, or the circuit court of the county, in counties in which a county court is not in existence, which shall stay the judgment appealed from. Any person appealing a judgment of a justice court or a municipal court under this section shall post bond for court costs relating to such appeal. . . .

Rule 7.03 provides in part:

Any person adjudged guilty of a criminal offense by a . . . municipal court may appeal . . . to circuit court by filing written notice of appeal within 40 days of such judgment with the clerk of the circuit court having jurisdiction. . . .

. . .

It shall be the duty of the judge or justice from whose judgment the appeal is taken to deliver to the clerk of the circuit court, within 10 days after the appeal bond is given, the bond taken by him, and a certified copy of his record in the case with all the original papers in the case.

In *Sanchez v. City of Picayune*, 656 So. 2d 92, 94 (Miss. 1995), the Mississippi Supreme Court, discussing Mississippi Code Annotated Section 99-35-1 and UCRCCP Rule 7.03, stated "[i]n order to perfect an appeal, a defendant must file a written notice of appeal within 40 days of conviction and post an appeal bond for court costs." The Court further stated that only "a notice of appeal and not an appeal bond [is required] in order to perfect an appeal" *Id.* Thus, the filing of a notice of appeal is necessary to perfect an appeal.

The appellants argue that there is a conflict between Rule 7.03 and Mississippi Code Annotated Section 99-35-1, and this Court should remedy any conflict between the two. However, in comparing Rule 7.03 and Mississippi Code Annotated Section 99-35-1, we have found no conflicts. Procedural aspects of appealing from a municipal court pursuant to this statute are subject to the Uniform Criminal Rules of Circuit Court Practice and this rule and statute are to be read in conjunction.

Next, the appellants complain that the Corinth Municipal Court Clerk received notices of appeal and paupers' affidavits in the cases in question ten days before the expiration of the forty-day time line for appeal, and that if the clerk had submitted this material to the circuit court as required, this would have cured any filing error of the appellants. They cite several Mississippi cases for the proposition that if a state official interferes with an individual's attempt to perfect an appeal, then there will be an exception in the time period allowed in filing an appeal. *See Benbow v. State*, 614 So. 2d 398 (Miss. 1993) (inmate delivered notice of appeal to authorities who failed to mail before deadline); *Adams v. Day*, 55 So. 2d 490 (Miss. 1951) (justice of the peace failed to properly certify the record to the circuit court). These cases are unhelpful to the appellants. In the above cases the parties were free of

any mistake themselves, it was the officials, who had a direct role in the perfection process, who performed incorrectly. In the appellants' case, they failed to file a notice of appeal in the correct court, not the clerk or municipal judge. While the rule does require that the clerk and judge certify a copy of the record and all original papers, the question becomes do the original papers include the notice of appeal? It would appear that this section of Rule 7.03 is to make certain that there is a record of the case below in the files of the circuit clerk, and not to provide notice of appeal, this being the responsibility of the appellant. The appellants cannot avail themselves of the failure of the court below to file the correct papers, since the underlying fact remains that the appellants failed to file their notices of appeal with the proper court.

Lastly, the appellants argue that if they were not entitled to an out-of-time appeal, the circuit court should have handled the matter as a petition for writ of certiorari under Mississippi Code Annotated Section 11-51-93. This section states in pertinent part:

All cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from justices of the peace; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. . . .

Miss. Code Ann. § 11-51-93 (1972).

The Mississippi Supreme Court in *Merritt v. State*, 497 So. 2d 811, 813 (Miss. 1986), stated that Rule 7.03 is not the single method of appellate review from a justice or municipal court. The Court stated that

one convicted of a criminal offense in justice court may obtain review in the circuit court--and a trial de novo--as a matter of right, so long only as he gives notice of appeal within 40 days of the judgment of conviction. . . . By way of contrast the application for a writ of certiorari under Section 11-51-93 is addressed to the sound discretion of the circuit court.

Id.

So, the appellants are correct in their assertion that a party may retain review of a municipal court ruling via Rule 7.03 or Mississippi Code Annotated Section 11-51-93. The appellants did not file a petition for writ rather they filed a motion to suspend rules or for alternate relief. We could construe this as an application for writ of certiorari, although a tenuous step at best. Notwithstanding, the statutory prerequisites also require that an affidavit be filed. The circuit court held a hearing, but no evidence was presented to the circuit court regarding the municipal court's decision. During the hearing, the only topic discussed was whether an appeal to the circuit court from the city court of Corinth was properly and timely perfected.

The Mississippi Supreme Court has stated before that "[w]e are not willing to accept anything less than full compliance with all the essentials [of Mississippi Code Annotated Section 11-51-93] within the time allowed." *Bertucci v. Department of Corrections*, 597 So. 2d 643, 647 (Miss. 1992).

Because the appellants did not meet the statutory prerequisites for filing a writ of certiorari under Mississippi Code Annotated Section 11-51-93 and filing a notice of appeal with the circuit court is mandatory to perfect an appeal, the appellants' arguments are without merit.

THE JUDGMENT OF THE ALCORN COUNTY CIRCUIT COURT IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. Subsequent to this appeal, the Uniform Criminal Rules of Circuit Court Practice are now embodied in the Uniform Circuit and County Court Rules adopted effective May 1, 1995.